FILED
NOV 12 1943
CHARLES ELMORE CROPLEY
CLERK

(22)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 444.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF THE RESPONDENTS IN OPPOSITION
and
EXHIBIT.

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OPINION BELOW.

The opinion of the Court below (R. 510) is reported in 349 Mo. 137, 159 S. W. 2d 666.

The opinion of this Court on petitioner's first petition for certiorari (cause No. 140) is reported in 317 U. S. 587, 87 L. Ed. 21.

JURISDICTION.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by an act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937, U. S. C. A., Title 28, Sections 344 and 344 (b), to review a judgment of Division Two of the Supreme Court of Missouri rendered in an action brought under the Federal Employers' Liability Act as amended August 11th, 1939, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404.

QUESTIONS PRESENTED.

1. Has this court jurisdiction to review the decision in question which was rendered by Division Two of the Supreme Court of Missouri, when a request for review of such decision by the Supreme Court of Missouri *en banc* was not timely made and when made was not entertained on the merits, but was stricken from the files?

2. Even if this Court has jurisdiction should it exercise its discretionary power by certiorari to review the decision in question where such decision holds: that the master is not liable for an act of horseplay by his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment, and where liability is predicated on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act.

STATEMENT.

This is the second petition to this Court for a writ of certiorari to the Supreme Court of Missouri in this case. The first petition was denied October 12, 1942 (R. 571). *Osment* v. *Pitcairn et al.*, 317 U. S. 587, 87 L. Ed. 21.

In denying the petition, this Court said:

> "In this case petitioner made no application to transfer the cause from Division Two, where it was heard and decided, to the court *en banc*. As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction."

(a) *The record discloses the following proceedings*:

December 16, 1941, Division Two of the Supreme Court of Missouri rendered its opinion in this case, reversing outright the judgment of the trial court in petitioner's favor (R. 510).

Within ten days thereafter, petitioner filed a motion for rehearing in Division Two of the Supreme Court of Missouri (R. 516).

March 13, 1942, Division Two overruled petitioner's motion for rehearing (R. 566). This was during the September, 1941, term of the Supreme Court of Missouri.

October 12, 1942, this Court denied certiorari because petitioner had not exhausted the appellate review provided by state law. Thereupon the mandate was sent down to the Supreme Court of Missouri.

In accordance with Sec. 1235, R. S. of Mo., 1939, the Clerk of the Supreme Court of Missouri sent down the mandate to the Jackson County Circuit Court, the trial court, and on November 21, 1942, record of the receipt and filing of the mandate was made by the Clerk of that court, and the judgment in favor of petitioner was set aside and judgment entered for respondents. The mandate was never thereafter recalled (See Exhibit 1, this brief).

March 3, 1943, petitioner made application to the Chief Justice of the Supreme Court of Missouri *en banc* to file a motion to transfer the cause from Division Two to the court *en banc*. The Chief Justice of the court *en banc* granted the leave (R. 569), and the motion to transfer was filed in the court *en banc* (R. 569). This

was in the September, 1942, term of the Supreme Court of Missouri (Sec. 2047, R. S. of Mo., 1939).

Thereupon respondents filed a motion to strike petitioner's motion to transfer to the court *en banc* from the files as untimely, because the Supreme Court of Missouri had lost jurisdiction of the cause, and because the motion to transfer was not filed within the time provided by Rule 24 of that court (R. 574).

April 1, 1943, petitioner amended his motion to transfer, and requested the Supreme Court of Missouri to recall the mandate from the trial court (R. 585).

On June 7, 1943, the Supreme Court of Missouri sustained respondents' motion to strike petitioner's motion to transfer the cause to the court *en banc* from the files (R. 588). Petitioner's motion to transfer was not considered on the merits, and the mandate was not recalled (Exhibit 1, this brief).

On August 23, 1943 (after the close of the October, 1942, term of this court), Robert H. Jackson, Associate Justice of the Supreme Court of the United States, ordered that the time for filing a petition for certiorari in this cause be extended to October 7, 1943, and on October 4, 1943, again extended the time for filing petition for certiorari to October 21, 1943.

On October 20, 1943, this petition for certiorari was filed in this court.

(b) *Facts on which petitioner's cause of action was based:*

This action was begun in the Circuit Court of Jackson County, Missouri, under the Federal Employers' Liability Act. The plaintiff, petitioner here, recovered judgment in the trial court which was reversed outright by Division Two of the Missouri Supreme Court. The evidence in the case was as follows—On August 21, 1939, petitioner Osment, a switchman in the employ of the respondents, was standing in respondents' freight house with Chamberlain

and Gardner, two members of his switching crew, near a water fountain. Finnell, a patrolman in the Wabash Receiver's Special Service Department, was sitting near the fountain facing the switching crew and about four or five feet from Osment. Gardner was facing Osment (R. 50) and Chamberlain was standing at Osment's right side. While the men were in these positions, and within a few feet of each other, John Stalac, a young man in the messenger department of the Wabash receivers, came through the freight house. He had no business with Osment or Finnell or any member of Osment's switching crew (R. 33, 134). He came up behind Osment, and without indicating what he intended to do (R. 24), put his arm around Osment's shoulder and neck in such manner that Osment could not see who it was, and held it there for from ten to thirty or forty seconds, Osment slipped to the floor in a sitting position and then fell back, striking the back of his head on the concrete floor. He was unconscious for a few seconds and there was a small abrasion on the back of his head and a little blood (R. 49). Stalac took Osment over to the water cooler, washed off Osment's head and put some disinfectant on it. While doing this, Osment and Stalac were talking and laughing over the occurrence and were apparently friendly (R. 49, 50). The Wabash Receivers offered no evidence on the accident and all of the testimony on that phase of the case is that of Osment's witnesses Chamberlain, Gardner and Osment.

Stalac went to work for Respondents as a young boy; he was playful like a big pup, addicted to good natured horseplay (R. 48). All of Osment's witnesses agree that when Stalac put his arm around Osment's shoulders, Osment did not struggle or cry out (R. 33, 50) and Chamberlain and Gardner, who were looking right at Osment, did not know that he was in any difficulty until he slipped to the floor (R. 33). Even then Gardner thought Osment was shamming (R. 45).

The amended petition (R. 2) after alleging that Stalac was employed by respondents as a messenger, and that

Finnell was employed by respondents as a peace officer whose duty it was to protect the property of respondents and protect their employees, charged that Stalac suddenly and without cause or warning seized Osment from behind about his throat and neck in the presence of Finnell and injured Osment. The petition alleged three grounds of negligence: (1) that Stalac was an incompetent and dangerous man for respondents to have in their employ, to respondents' knowledge, and that respondents were negligent in retaining and continuing him in their employ, (2) that respondents owed Osment a duty to maintain a safe place to work and that the retention of Stalac in their employ, knowing his dangerous characteristics, was negligence and ratified his conduct and dangerous condition and approved his assault on Osment, and (3) that Finnell, who knew of Stalac's dangerous propensities, was employed by respondents to protect Osment and other employees from attacks, assaults, etc., and that Finnell who was present when Stalac assaulted Osment, permitted, ratified and allowed the dangerous seizure when with the means at hand and in time he could have stopped and prevented the seizure and have warned Osment of Stalac's presence and of the impending seizure in time to have prevented the same and have prevented the resultant injuries after the peril and seizure arose.

The first two allegations of negligence are based on the retention of Stalac, the third on Finnell's failure to act after Osment's peril was known by Finnell to be imminent. The third theory of recovery went out of the case on the court's refusal to give petitioner's Instruction 3 (R. 297).

The answer was a general denial.

SUMMARY OF ARGUMENT.

(1) This Court does not have jurisdiction to review the decision in question because:

(a) The Supreme Court of Missouri did not have jurisdiction to entertain, and did not entertain on the merits, petitioner's motion to transfer the cause to the Supreme Court of Missouri, *en banc,* but struck it from the files; petitioner's motion was filed after the term had expired at which final judgment was rendered in the cause by Division Two of the Supreme Court of Missouri and after the mandate had gone down to the trial court.

(b) Petitioner's motion to transfer was not filed within the time provided by Rule 24 of the Supreme Court of Missouri and was stricken from the files.

(c) Leave was granted and petitioner's motion to transfer was filed in the Supreme Court of Missouri *en banc,* which under no circumstances has the power to entertain motions to transfer from division to the court *en banc;* under the Missouri law, motions to transfer must be filed in the division which decided the cause; the motion was not considered on the merits, but was stricken from the files.

(d) The untimely motion of the petitioner to exhaust the appellate review provided by state law, which was not considered on its merits does not give this court jurisdiction.

(2) Even if this Court has jurisdiction, the petition for certiorari should be denied because the decision of Division Two of the Missouri court, in holding that a master is not liable for an act of horseplay of his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment and where liability is claimed on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act, is not contrary to but is in accord with the applicable decisions of this Court.

ARGUMENT.

I.

This Court Does Not Have Jurisdiction.

The opinion in this cause was rendered by Division Two of the Supreme Court of Missouri on December 16, 1941. A timely motion for rehearing was filed in said court by petitioner herein, which motion was overruled on March 13, 1942. Within three months thereafter, petitioner filed his first petition for certiorari, which was denied by this court on October 12, 1942, because petitioner had made no application to transfer the cause from Division Two of the Supreme Court of Missouri, which heard and decided the cause, to the court *en banc*, and had therefore not exhausted the appellate review provided by state law. *Eugene W. Osment* v. *Norman B. Pitcairn et al., Receivers*, 317 U. S. 587, 87 L. Ed. 21; citing *Gorman* v. *Washington University*, 316 U. S. 98, 86 L. Ed. 895; *Scheuffler* v. *Manufacturing Lumbermen's Underwriters*, 349 Mo. 855, 163 S. W. 2d 749 (Mo). See also respondents' brief on first petition for certiorari, case No. 140, October. 1942, term.

On March 3, 1943, petitioner asked leave to file and filed in the Supreme Court of Missouri *en banc*, a motion to transfer the cause from Division Two to the court *en banc* (R. 569). The September term, 1941, of the Supreme Court of Missouri, the term at which petitioner's motion for rehearing was denied by Division Two, expired May 4, 1942. Sec. 2047, R. S. of Mo., 1939.

The motion to transfer to the Supreme Court of Missouri *en banc* was not filed until the September, 1942, term of that court, namely on March 3, 1943 (R. 569). Respondents thereupon filed in the Supreme Court of Missouri, a motion to strike petitioner's motion to transfer from the

files. The grounds set forth in the motion to strike were: first, that the court had no jurisdiction to entertain petitioner's motion because the term of the Supreme Court of Missouri, at which petitioner's motion for rehearing was denied, had expired; second, that the court had no jurisdiction because the mandate had gone down to the trial court; and third, that the motion to transfer was not filed within the time provided by Rule 24 of the Supreme Court of Missouri. The motion to strike was sustained.

That the Supreme Court of Missouri lost jurisdiction of the cause at the expiration of its September, 1941, term of said court while no motion was pending in said court, and therefore had no power to entertain petitioner's motion to transfer, has been definitely and conclusively settled by the decision in the case of *Aetna Insurance Company* v. *Hyde, Superintendent of Insurance*, 327 Mo. 115, 34 S. W. 2d 85, decided by the court *en banc*. In that case, the Court held that the withholding of the mandate to allow application for certiorari to be made to the Supreme Court of the United States did not toll the jurisdiction of the Supreme Court of Missouri over the cause beyond the end of its term at which its decision was rendered. That the Supreme Court of Missouri has no jurisdiction after the term has expired at which the cause was determined, is and always has been the law of Missouri.

Prassee v. *Prassee*, 343 Mo. 388, 115 S. W. 2d 809.
Hurt v. *Edwards*, 347 Mo. 667, 148 S. W. 2d 542.

It is equally well settled in Missouri that the Supreme Court of Missouri lost jurisdiction of this cause when the mandate was transmitted to the trial court. *Gary Realty Company* v. *Sweeney*, 207 S. W. 43 (Sup.); *State ex rel. Broaddus*, 234 Mo. 358.

The motion to transfer filed in the September, 1942, term of the Supreme Court of Missouri therefore was not timely because that court did not have jurisdiction to entertain it when filed. The Court recognized that it had

no jurisdiction, and struck petitioner's motion to transfer from the files (R. 588).

Not only did the Supreme Court of Missouri have no jurisdiction to entertain petitioner's motion to transfer, but the motion was not timely filed under Rule 24 of that court. Rule 24 provided that a motion to transfer a cause under the provisions of the Constitution from either division to the court *en banc* must be filed within ten days after the final disposition of the cause by the division. The motion for rehearing was overruled by Division Two on March 13, 1942. The motion to transfer was not filed until March 3, 1943, almost a year after final disposition of the cause in Division Two, and not within the ten days provided by Rule 24. The Supreme Court of Missouri sustained the motion to strike petitioner's motion to transfer from the files, and did not entertain it on the merits.

Both on account of lack of jurisdiction and under Rule 24, petitioner's motion to transfer was not timely filed in the Supreme Court of Missouri. By striking the motion from the files, the court not only refused to entertain it on the merits, but recognized that it could not do so. This court, in somewhat analogous situations, has dealt with the effect of filing untimely motions which were not entertained on the merits as conferring jurisdiction on this court, and has held that the effect of such motions is nil to confer jurisdiction on this court.

Gypsy Oil Company v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393.

Pfister v. *Northern Illinois Fin. Corp.*, 317 U. S. 144, 87 L. Ed. 123.

Benard's v. *Johnson*, 314 U. S. 19 (l. c. 31), 86 L. Ed. 11 (l. c. 19).

Therefore, since the petitioner did not seek to exhaust his appellate review in the state court until the possibility of such review was barred by that court's loss of jurisdiction and under its Rule 24, his untimely effort, which was not and could not have been entertained on the merits, did not give this court jurisdiction, and the petition for certiorari must be denied for want of jurisdiction.